SUPREME COURT, U. S.

DEC 13 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 766.

HARRY R. LEA and ROSLYN T. LEA, Co-Partners
Trading as HARRY R. LEA & COMPANY,
Petitioners,

v.

CONSOLIDATED SUN RAY, INC., SUN RAY DRUG CO.,
BARGAIN CITY, U.S.A., INC.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 776

HARRY R. LEA AND ROSLYN T. LEA, Co-PARTNERS TRADING AS HARRY R. LEA & COMPANY,

Petitioners,

v.

CONSOLIDATED SUN RAY, INC., SUN RAY DRUG CO., BARGAIN CITY, U. S. A., INC.,

Respondents.

ARGUMENT.

I. The Respondents Have Failed to Point to Any Evidence to Support the Factual Conclusion Necessary to Sustain the Judgment.

Respondents have not met the challenge of petitioners [1] to point to even one fact of record which supports the conclusion that defendant Lea was responsible for the existence of Steel's "fraud in the loss history" defense.

Rather, the respondents somehow reason that they do not have the burden of proving by a preponderance of the

1. Petitioners' brief, page 5.

evidence that Lea was responsible for the existence of Steel's "primary" defense to the prior suit.[2]

In making this argument the respondents forget that they were the plaintiffs in this suit and had all the normal burdens of proof, including, quite basically, proof of causation. Respondents clearly had the burden to prove that Lea was responsible for the existence of all the facts that necessitated the Steel settlement. This obviously included the defenses raised by Steel in refusing to make full payment on the policy.

While respondents accuse the petitioners of being guilty of "contrived semantics"[3] this shifting of the burden of proof is truly a contrived situation. Logic and respondents' theory of liability dictate that they, not petitioners, had the burden to prove why the case was settled and that Lea was responsible for the facts causing them to settle. The record is clear that one of the reasons that they settled was because of Steel's *primary* defense.[4]

Respondents admit that there is no evidence to show that Lea was responsible for the existence of this "primary defense".[5]

Respondents argue that the "fraud in the loss history" defense was not a true and meaningful defense raised by Steel in the prior suit. To support this assertion they argue that in the Steel action there was no evidence of failure to provide loss history information and thus the defense must be treated as meaningless.[6]

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2. First full paragraph, respondents' brief, page 7.

3. First three lines of respondents' argument, p. 5.

4. The last two lines of the Steel memorandum at page 225a of Appellants' Appendix filed in the Court of Appeals.

5. Respondents' brief, page 7, middle of the page.

6. Respondents' brief, page 6, bottom of the page. However, Steel's defenses were never reached at trial because of the settlement.

Petitioners respectfully point out that the record in the Steel case (whatever it may have been) is not the record in *this* case and what respondents claim occurred in that case cannot here be considered. The evidence in the instant matter is conclusive that Steel made "fraud in the loss history" its *primary* defense.

There can be no doubt that such defense was one of the colorable defenses raised by Steel as it was so designated by the District Court and the Court of Appeals. Its existence obviously contributed to the settlement. There is no evidence to contradict Steel's assertion as to what was its "primary defense".

Respondents do agree that this case was submitted on an "all or nothing" basis [7] and thus concede that they have always had the burden to prove that Lea was responsible for *all* the defenses raised by Steel in the prior case in order to recover the difference between the settlement thereof and the policy limits. See *Hilton v. The Federated Brokerage Corp.*, 213 N. Y. S. 2d 171, 30 Misc. 2d 503 (1961) quoted at p. 7 of petitioners' brief.

The respondents also admit [8] that they did not produce any such evidence since they state that "to characterize as a 'primary defense' a 'bornbook' defense, *as to which all parties concede there is no evidence*" (emphasis ours).

Thus it is clear that neither the respondents, the District Court nor the Court of Appeals are, or were, able to make reference to any evidence to sustain the conclusion that Lea was responsible for the existence of the "fraud in loss history' defense and *as a consequence* was responsible for the existence of *all* the defenses and a total liability of $580,000.

On this "all or nothing" basis, not a shred of evidence existing to prove Lea liable for Steel's *primary* defense, it

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7. Respondents' brief, page 5, top half.

8. Respondents' brief, page 7, middle of page.

is not only unconscionable but unconstitutional for the courts to enter a verdict in this or any amount.

Respectfully submitted,

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